PRESIDENT, DISTRICT COUNCIL, BATU PAHAT v. LO HONG TAN

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Yusoff Mohamed J.) September 4, 1982 & January 30, 1983]

[Johore Bahru – Federal Court Civil Appeals Nos. 221-225 of 1981]

Administrative Law – Certiorari – Revocation of licence by District Council – Right to be heard – Bias – Power of court to intervene – Improper exercise of discretion – Johore Town Boards Enactment, s. 76 – Local Government Act, 1976, ss. 82, 83 & 107(2).

Local Government – Premises alleged to be in ruinous or dangerous condition or likely to fall – Notice issued by District Council – No closing order made – Licence to carry on business in premises revoked – Improper exercise of discretion – Johore Town Boards Enactment, s. 76 – Local Government Act, 1976, ss. 82, 83 & 107(2).

Practice and Procedure – Appeal – Judgment based on inferences from findings of fact – Evidence adduced by affidavit – Appeal Court in as good position to evaluate evidence as trial court.

In this case the appellant had issued a notice that the premises occupied by the respondent were in a ruinous or dangerous condition or likely to fall. The respondent through his solicitors replied that the premises were in good habitable condition and offered to repair the premises. Subsequently the landlord issued a notice to quit. The appellant then revoked the respondent's licence to carry on business in the premises as he said the premises were not safe for human occupation. The appellant applied for *certiorari* and the learned Judicial Commissioner quashed the appellant's order. It appeared that the learned Judicial Commissioner found that the appellant was biased or that there was real likelihood of bias. The appellant appealed.

Held: (1) the appellant in this case was justified from the reports of the Engineer and the Health Officer in concluding that the premises were in a ruinous state, likely to fall or to catch fire and a danger to both occupant and neighbours – in other words in taking action under section 76 of the Town Boards Enactment of Johore;

(2) in this case no closing order and no order of demolition had been issued under section 83 of the Local Government Act. Had such orders been made an order revoking the licence would obviously have been unnecessary;

(3) whilst the allegation of bias, the burden of which lies on the respondent, had not been proved, the court was satisfied that the order of revocation in this case was an improper exercise of discretion and that *certiorari* would lie.

Cases referred to:

(1) *Tithes Dental & Photo Supply Sdn. Bhd.* v. *Empresa Lineas Maritimes Argentinas & Ors.* [1977] 2 M.L.J. 13.
(2) *Whitehouse* v. *Jordan* [1981] 1 All E.R. 267.
(3) *Mohamed Ashraff & Anor.* v. *The Commissioner for the Federal Capital, Kuala Lumpur* [1972] 2 M.L.J. 69.
(4) *Sim Yan Hoo* v. *Matu and Daro District Council* [1967] 1 M.L.J. 71.
(5) *Congreve* v. *Home Office* [1976] Q.B. 629.

FEDERAL COURT.

Teh Poh Teik for the appellant.
K.S. Dass for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The respondent in Civil Appeal No. 221 of 1981 is the tenant of No. 2-4 Jalan Ampuan, in the heart of Batu Pahat, premises built long before the Second World War, controlled premises under the Control of Rent Act.

The other four respondents are tenants of adjoining shophouses also built at about the same time.

The owner of all these shophouses is one Sharifah Raguan bte Hassan Aljofri.

Since the complaints of the other respondents are basically the same they had agreed to make common cause with respondent in Civil Appeal No. 221 of 1981 (hereinafter referred to as Respondent Lo), who was the applicant before the learned Judicial Commissioner.

Respondent Lo had been in occupation of No. 2-4 Jalan Ampuan for over 16 years at the time of application, carrying on his business and paying rent regularly.

Sharifah (the landlord) desiring to obtain vacant possession had on June 26, 1979 written to Respondent Lo (a copy of which was sent to appellant) stating that the premises were in a ruinous or dangerous state, likely to fall down, which under section 76(1) of the Town Boards Enactment (Johore – Cap. 118) empowers the President of the District Council, the appellant, to do a number of things, including demolition of the offending premises.

On July 10, 1979 Respondent Lo's solicitor replied to the letter stating that the premises were in good habitable condition. Rent was tendered but was refused.

On August 30, 1980 the appellant issued a notice under section 76(1) of the Enactment stating that the premises were in a ruinous or dangerous condition or likely to fall. On September 14, 1980 Respondent Lo's solicitor wrote

to appellant outlining the contention of the respondent, and included an offer by the latter to repair the premises at his own expense. At the same time appellant's approval was sought for such repairs. No reply was made by appellant.

On February 21, 1981 the landlord issued a notice to Respondent Lo to quit and deliver vacant possession by March 31, 1981. On March 26, 1981, 5 days before the expiry of this notice, appellant revoked respondent's licence on the ground that the premises were not safe for human occupation.

Following this, water supply to the premises and to the shophouses occupied by the other respondents was disconnected by the J.K.R. Water supply was restored later subsequent on an application to court.

Appellant in his affidavit alleged that his cancellation of the licences to operate business had been made after considering two reports, namely one by the Health Department and the second by the J.K.R. dated May 27, 1980.

The learned Judicial Commissioner considered the evidence and expressed his inability to see how appellant could have come to the conclusion that the premises were in a dangerous state of imminent collapse, leading him to revoke Respondent Lo's licence to operate the business on the premises. Though he did not say so explicitly, the general tenor of his judgment and his quashing of appellant's order would make it safe for us to conclude that he agreed with what counsel for respondent submitted – that the appellant was biased, or at least that there was real likelihood of bias or real suspicion of bias.

On behalf of appellant, it was urged that there was ample evidence to justify the decision taken by him and the Town Council.

The report of the Jabatan Kesihatan (pp. 38/39 of the Appeal Record), in particular paragraph 12 thereof, "serupa dengan yang lain-lain" is amplified in the identical report on the adjoining premises (see p. 40 paragraph 15 in Record of C.A. No. 222/81) which reads, "This building is an old building and needs many repairs. Beside that this building was not built according to the modern health conditions and is erected on a substandard shop house lot."

Referring next to the report from the J.K.R., signed by a Senior Works Engineer (pg. 43) the material part reads:

> "The said shops are double storey wooden shops with corrugated zinc sheet roof. Their conditions have deteriorated and the pillars are slightly slanting. The poor and deteriorated conditions of the wall can cause them to catch fire easily."

What was considered by the appellant which led to the decision complained of appears in paragraphs 8 to 14 of his affidavit, (pp. 34 & 35 of the Appeal Record) and corresponding paragraphs in his affidavits in the other appeals. It was emphasized that the decision to cancel the various business licences was first made by the Licence & Health Committee which had its own Chairman (not appellant) and seven members including ex-officio members, and that the decision of this Committee was then considered and confirmed by the entire Council (of 25 members) under appellant's chairmanship a week later. In other words the decisions were collective.

On behalf of the respondents, the following matters, we were told, showed bias on the part of appellant:

(i) the disconnection of the water supply,

(ii) acting on the copy of the letter (at page 19) sent to the various respondents/ tenants asking them to deliver vacant possession on the grounds that the premises were in a dangerous state of disrepair, and

(iii) issuing notice under section 76(1) of the Town Board Enactment after receiving the letter.

It is well known that an Appellate Court is in as good a position to evaluate evidence as the trial court where the latter has made inferences from findings of fact – see *Tithes Dental & Photo Supply Sdn. Bhd.* v. *Empresa Lineas Maritimes Argentinas & Ors.*[1] and *Whitehouse* v. *Jordan*[2]. Moreover it was emphasized that the trial court has no special advantage over this court in that all the evidence adduced was by affidavit.

We therefore are at liberty to consider the evidence and make our own inferences.

We are inclined to agree with learned counsel for the appellant that the learned Judicial Commissioner had indeed overlooked a number of important facts. Firstly the Health report was not unsigned or undated. It was accompanied by a letter signed by the Pegawai Kesihatan Kanan dated November 10, 1979. Also apart from the relatively innocuous statement that the "cement floor was broken and cracked everywhere", he

should have referred to the remarks column in the health reports respecting the adjacent shophouses (that in respect of respondent's shop being "similar to the others"). He would then find reported therein that the building was old, in need of many repairs, not built according to modern health conditions and erected on a substandard shophouse lot.

The Engineer's report is doubtlessly brief but whilst we agree with the learned Judicial Commissioner that it did not state that the premises are in a ruinous or dangerous state of imminent collapse, the report particularly when considered with that portion of the Health Officer's report would reasonably cause the appellant to conclude that it is in a ruinous state, likely to fall or to catch fire, and a danger to both occupant and neighbours – in other words, would justify action under section 76 of the Enactment.

However, we note that the respondent had in his Originating Notice of Motion prayed for an order of *certiorari* to quash appellant's order to revoke the licence of the respondent to carry on business on the premises. (Water having been connected before the hearing, respondent abandoned the second prayer). We note that the notice of revocation (dated March 26, 1981 at page 25) mentioned, as a reason for such revocation the finding that the premises were no longer suitable for occupation (disahkan tidak sesuai bagi diduduki).

The Local Government Act 1976 was brought into effect in the District Council of Batu Pahat on August 28, 1979, replacing roughly the first half of the Johore Enactment (see the Second Schedule).

Under the law pertaining at the enquiry held by the Council in 1980, therefore, licences may be revoked under section 107(2) (of the Act), which provides:

"Every licence or permit granted shall be subject to such conditions and restrictions as the local authority may think fit and shall be revocable by the local authority at any time without assigning any reason therefor."

Encik Teh submits and Encik Dass for respondent agrees that the language of this subsection removes the right to be heard, and cites by way of analogy the decision of this court in *Mohamed Ashraff & Anor.* v. *The Commissioner for the Federal Capital, Kuala Lumpur*[2].

There it was held that section 18A of the Control of Rent Act 1966 leaves no discretion with the Commissioner upon proof of compliance with section 18A(1)(a) – planning permission having been granted; (b) availability of funds and (c) written undertaking to commence development work within 6 months of date of possession. In the absence of any provision as to the mode of enquiry, no question of failure to observe the principles of natural justice can arise, the Commissioner's function under the section being purely administrative and not answerable to *certiorari*.

We note that section 18A(12) aims at excluding intervention by the courts and reads:

"Any order made by the Commissioner under this section shall be final and conclusive and shall not be questioned in any court."

Counsel in addition submitted that the decision of Lee Hun Hoe J. (as he then was) in *Sim Yan Hoo* v. *Matu and Daro District Council*[3] can be distinguished because there the right to be heard has been provided by statute.

We feel that it would not be inappropriate to say that the right to be heard may exist, in certain circumstances, without express statutory provision therefor.

Even where a discretion such as that given to the appellant by section 107(2) appears to be unfettered, the courts will intervene if it is exercised arbitrarily and improperly – see *Congreve* v. *Home Office*[4].

An enlightening passage is to be found at pages 326-327 of *de Smith's* Judicial Review of Administrative Action, 4th Edition which reads as follows:

"If a discretionary power is conferred without reference to purpose, it must still be exercised in good faith and in accordance with such implied purposes as the courts attribute to the intention of the Legislature. The Minister who, in reliance on an ostensibly unfettered discretionary power, refused to refer a complaint by milk producers to a committee of investigation because this might lead him into economic and political difficulties, was held to have violated the unexpressed purpose for which the power of reference had been conferred and (according to a somewhat hyperbolical interpretation of their Lordships' comments) 'was roundly rebuked by the House of Lords for his impudence.' In order to avoid paying an announced (but not yet enacted) increase in the fee for a television licence, some licence-holders obtained another licence at the old rate before their existing licence expired. The

Court of Appeal held that the Minister could not use his power to revoke licences in order to deprive licensees of the advantage that they had secured from the gap between the Government's announcement and Parliamentary authorisation of the change in fees."

We note from his affidavit that the respondent in Civil Appeal No. 222 of 1981 had argued that the proper course for the appellant to take would have been to get the landlord to herself put the premises into a habitable condition.

Under the provisions of the Act which by the time the enquiry was held had become applicable a closing order under section 82(9) of the Act could have properly been made in which case the respondent as occupier could have been asked to leave under section 82(12).

It is not disputed that respondent had, through his solicitor offered to repair the premises, an offer to which appellant did not deign to reply. At the time of his filing the affidavit (June 1981), and indeed up to the time the appeal was argued in September 1982 it would appear that no closing order, or no order of demolition under section 83 had been issued.

Had such orders been made, an order revoking the licence would obviously have been unnecessary. Whilst we would hesitate to say that we have found that the allegation of bias, the burden of which lies on respondent has been proved, we are satisfied that the order of revocation is an improper exercise of his discretion similar to that in *Congreve's* case and that *certiorari* would lie.

We would therefore affirm the order made by the learned Judicial Commissioner, albeit for a different reason.

The appeal is dismissed, and since the other respondents have had their licences revoked in similar circumstances, appellant's order revoking all the licences are hereby quashed. Appellant to pay costs here and in the court below on the higher scale.

Appeal dismissed.

Solicitors: *Abdul Rahman Saad & Associates; Wong & Dass.*

YAHAYA BIN MAT & ANOR. v. ABDUL RAHMAN BIN ABU

[O.C.J. (Syed Agil Barakbah J.) December 8, 1979]

[Alor Star – Civil Suit No. 305 of 1975]

Damages – Injured plaintiff discharging himself from hospital against medical advice – Unsuccessful treatment by bomoh – Readmission to hospital – Serious permanent disability.

The plaintiff, an infant, suffered a fracture of the right femur and a few minor lacerations. A plaster cast was applied to his injured leg. He discharged himself from the hospital against medical advice 40 later. Thereafter, the leg was treated by a bomoh who removed the plaster cast. The said treatment lasted for a month and was unsuccessful. The plaintiff readmitted himself into the hospital and remained there for 3 days. Shortening was 2½ inches and was due to a maltreated fracture. He walked with a limp. Disability was serious and permanent.

Held: the plaintiff was to be blamed for having failed to mitigate his injuries by his own action in getting a discharge against medical advice and undergoing treatment under a bomoh on his own initiative before being readmitted. The disabilities including the shortening of his leg would have been serious had he stayed on in the hospital for full treatment. Shortening of the leg deducted by half and accepted as 1¼ inches. $16,000 for pain and suffering and loss of amenities and $2,000 for loss of future earnings.

[**Editorial note**: The case is now reported only on the question of damages. A report of the Federal Court appeal appeared in [1982] 1 M.L.J. 202].

Cases referred to:

(1) *Pradep s/o M. Gopal (an infant) suing by his mother and next friend* v. *Kamruddin bin Mohd. & Anor.* Kuala Lumpur Civil Suit No. 1001/1967 (see *Dass* on Quantum in Accident Claims at page 683).
(2) *Kim Choi* v. *Ibrahim* [1972] 1 M.L.J. 253.
(3) *Arokiasamy Stanislaus John* v. *Ng Soo Puang* Muar Civil Suit No. 67/1971 (see *Dass* on Quantum in Accident Claims at page 694).

CIVIL SUIT.

P.R. Maneksha for the plaintiff.
Baldev Singh Bhar for the defendant.

Syed Agil Barakbah J.: ... Quantum: The plaintiff was admitted to the General Hospital, Kangar on October 25, 1974 with a fracture of the right femur and a few minor lacerations. He was treated while in hospital and discharged about forty days later on December 4, 1974, at his own request and against medical advice. On examination he was found to suffer from the following injuries:–